

1995

State of Utah v. Guido John Alvillar : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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THE STATE OF UTAH,

:

DOCKET NO. 950422-CA
BRIEF OF APPELLANT

Plaintiff/Appellee,

:

v.

:

GUIDO JOHN ALVILLAR,

:

Case No. 950422-CA

Defendant/Appellant.

:

Priority No. 2

APPEAL FROM DEFENDANT/APPELLANT'S CONVICTION
IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH, THE
HONORABLE MICHAEL R. MURPHY, PRESIDING, OF
BURGLARY, A SECOND DEGREE FELONY, IN
VIOLATION OF UTAH CODE ANN. § 76-6-202, AND
THEFT, A SECOND DEGREE FELONY, IN VIOLATION OF
UTAH CODE ANN. § 76-6-404.

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FILED

Utah Court of Appeals

OCT 27 1995

Marilyn M. Branch
Clerk of the Court

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	BRIEF OF APPELLANT
Plaintiff/Appellee,	:	
v.	:	
GUIDO JOHN ALVILLAR,	:	Case No. 950422-CA
Defendant/Appellant.	:	Priority No. 2

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	BRIEF OF APPELLANT
Plaintiff/Appellee,	:	
v.	:	
GUIDO JOHN ALVILLAR,	:	Case No. 950422-CA
Defendant/Appellant.	:	Priority No. 2

JURISDICTION

Defendant/Appellant Guido John Alvillar appeals from his Salt Lake County District Court conviction of Burglary, a second degree felony, in violation of Utah Code Ann. § 76-6-202 (1953 as amended), and Theft, a second degree felony, in violation of Utah Code Ann. § 76-6-404 (1953 as amended). This Court has jurisdiction over Mr. Alvillar's appeal pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 94).

STATEMENT OF THE ISSUE PRESENTED

Did trial counsel provide ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and Article I, § 12 of the Utah Constitution when she elicited testimony informing jurors that Mr. Alvillar had a felony conviction, was on parole and had escaped recently from a halfway house?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The United States Constitution provided in pertinent part that "In all criminal prosecutions, the accused shall ... have the assistance of counsel for his defense." U.S. Const., Am. VI.

The Utah Constitution states in relevant part that "In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel." Utah Const., Art. I, § 12.

STATEMENT OF THE CASE

Defendant/Appellant Guido John Alvillar was charged by Information filed in Salt Lake County in August 1994 with Burglary, a second degree felony, in violation of Utah Code Ann. § 76-6-202 (1953 as amended), and Theft, a second degree felony, in violation of Utah Code Ann. § 76-6-404 (1953 as amended). By Amended Information filed in December 1994, Mr. Alvillar was charged with Theft by Receiving Stolen Property, a second degree felony, in violation of Utah Code Ann. § 76-6-408 (1953 as amended), as an alternative to the Theft charge, and with False Identity to a Peace Officer, a Class C misdemeanor, in violation of Utah Code Ann. § 76-8-507 (1953 as amended).¹

¹ The False Identity charge was severed from the Burglary and Theft counts and was later dismissed.

The charges against Mr. Alvillar were based on the August 2, 1994 burglary of the Salt Lake City home of Bill and Joan Coles. At that time, Mr. Alvillar was living in the home of Robert Nyman, a cook at the Dodo restaurant and called himself "Steve Falconi." (Transcript of Trial, P. 103-04). Mr. Alvillar had told Mr. Nyman at least two weeks earlier that he intended to sell a classical compact disc collection to get money to pay rent. (Transcript of Trial, P.116).

At trial, Joan Coles testified that she returned from work at about 5:30 or 5:45 p.m. and found that someone had shattered the glass in French doors into her home. (Transcript of Trial, P. 58). The wood framing on the French doors was splintered, and the doors were open into the dining room from a porch. (Transcript of Trial, P. 59). After calling the police, Ms. Coles discovered that most of her compact disc collection of classical music and a portable Sony Discman were missing, along with videotapes of the operas "Don Giovanni" and "La Traviata," an Olympus camera, a blue travel bag and a plastic book bag. (Transcript of Trial, P. 63). According to Ms. Coles, one of the stolen compact discs, a recording of lute music from the Italian Renaissance, had been given to her by the musician's parents and was very rare. (Transcript of Trial, P. 74).

While waiting for the police to arrive, Ms. Coles called Bill Goldsmith, the owner of Discriminator Music, a store that specializes in classical music. (Transcript of Trial, P. 76). Ms. Coles told Mr. Goldsmith that her collection was missing and alerted him to watch for attempts to sell her compact discs. (Transcript of Trial, P. 76-77). On the afternoon of August 3, 1994, Mr. Goldsmith called Ms. Coles and told her that someone was attempting to sell the compact discs. (Transcript of Trial, P. 77). According to Mr. Goldsmith, a man had come into the store with about 60 compact discs to sell. (Transcript of Trial, P. 124). Mr. Goldsmith realized that he had sold some of the compact discs to Ms. Coles. The rare compact disc of lute music also was included in the compact discs brought to Discriminator Music. (Transcript of Trial, P. 125).

Ms. Coles called the police and her daughter, Katie Coles, who lived near the music store. (Transcript of Trial, P. 76,78). Katie Coles testified that she immediately went to Discriminator Music. She saw a man she later identified as Mr. Alvillar sitting in a Toyota truck outside the store although it was a very hot afternoon. (Transcript of Trial, P. 133). Inside the store, a man later identified as Robert Nyman was browsing. According to Katie Coles, she looked at Mr. Nyman very closely but he did not appear to be nervous. (Transcript of Trial, P. 234-45).

Officer Robert Reese of the Salt Lake City Police Department testified that he contacted Mr. Nyman inside the store and was told that he had received the compact discs from the man in his Toyota truck, whom he knew as "Steve Falconi." (Transcript of Trial, P. 147). "Steve Falconi" told another officer, George Pregman, that he did not know who owned the truck. Officer Pregman testified that his behavior was suspicious because he acted like he didn't know Mr. Nyman. (Transcript of Trial, P. 140). Inside the store, the defendant said he had never seen the compact disc collection before, but then disputed Ms. Coles' statement that it was a unique collection. (Transcript of Trial, P. 82,135).

Mr. Alvillar was arrested by Officer Pregman. Officer Reese went with Mr. Nyman to search his home and recovered videotapes of "Don Giovanni" and "La Traviata," a cassette tape, an Olympus camera, a Sony Discman and two bags. (Transcript of Trial, P. 148-49). Mr. Nyman was not arrested because he denied knowing that the compact discs had been stolen and he seemed calm and relaxed rather than nervous. (Transcript of Trial, P. 114, 155). Additionally, Mr. Nyman had been at work during the day on August 2, when the burglary had occurred. (Transcript of Trial, P. 155).

Mr. Nyman testified that he finished work at about 4 p.m. on August 2,

1994 and returned home. Mr. Alvillar was not home, but he called at about 5 p.m. to ask for a ride from the corner of Ninth East and Second South. When Mr. Nyman picked him up, Mr. Alvillar was carrying a large, heavy blue bag and took about 100 compact discs from the bag when they returned home. (Transcript of Trial, P. 107,108-09). On August 3, 1994, Mr. Alvillar asked Mr. Nyman to help him sell the compact discs. (Transcript of Trial, P. 110-11). They went to the Gray Whale II, another compact disc store, and left about 50 compact discs to be appraised. At the Gray Whale, Mr. Alvillar went into the store but did not say anything. They then went to the Discriminator, where Mr. Alvillar said he wanted to stay in truck. (Transcript of Trial, P. 112).

Detective Lynn Wright testified that Mr. Alvillar gave the name "Steve Falconi" when he was interviewed in the jail and said that Mr. Nyman had brought the compact discs home from work at about 3 p.m. on August 2. (Transcript of Trial, P. 161, 162). Mr. Alvillar also said that he was just "along for the ride" when the compact discs were taken to the music stores. (Transcript of Trial, P.162).

Mr. Alvillar testified that, in June 1994, he gave a friend \$500 to start a mail order business and was expecting a return of five times his investment. (Transcript of Trial, P. 170-71). In July 1994, Mr. Alvillar learned that the money had been lost. His friend promised in mid-July that he would have the

money by the beginning of August or he would give Mr. Alvillar a compact disc collection in lieu of payment. (Transcript of Trial, P. 171). Mr. Alvillar went to the friend's apartment at Ninth East and Third South at about 2:30 p.m. on August 2, 1994 to get the collection. Although his friend asked for more time to get the money, Mr. Alvillar's friend gave him a bag containing compact discs, a camera and a portable compact disc player. (Transcript of Trial, P. 174-75).

Mr. Alvillar testified that he believed these items belonged to his friend. (Transcript of Trial, P. 176). He said in direct examination that he had used the name of "Steve Falconi" because he had been convicted of a felony 13 years earlier. (Transcript of Trial, P. 177). He also told jurors that he had absconded from a halfway house in June 1994 and was afraid that he would be returned to prison as a parole violator if his real name was known. (Transcript of Trial, P. 177-78). Mr. Alvillar testified that this fear also explained his failure to admit any knowledge of the compact disc collection and his attempt to blame Mr. Nyman for the theft. (Transcript of Trial, P. 180-81, 185).

Mr. Alvillar testified that the friend who had given him the compact discs had moved to California and could not be located. (Transcript of Trial, P. 185). Police compared fingerprints found at the crime scene to those of Mr. Alvillar, Mr. Nyman, Bill Coles and Joan Coles. The print from Ms. Coles was

not sufficient for a comparison, and those of the three men did not match the crime scene print. Police did not seek another fingerprint from Ms. Coles. (Transcript of Trial, P. 158).

After deliberating for approximately three hours, jurors returned a verdict finding Mr. Alvillar guilty of Burglary and Theft. He was sentenced on May 22, 1995 to concurrent terms of 1 to 15 years on the burglary charge and 0 to 5 years on the theft count. These terms are to be served consecutive to the sentence under which Mr. Alvillar had been paroled to the halfway house. (Transcript of Sentencing, P.7). Mr. Alvillar's Notice of Appeal was timely filed on June 20, 1995.

SUMMARY OF THE ARGUMENT

There was no legitimate tactical reason for defense counsel to elicit testimony that Mr. Alvillar had been convicted of a felony, was on parole and had escaped from a halfway house. This information would have been inadmissible if the prosecution had been its proponent, and it was extremely prejudicial. As a result, Mr. Alvillar received ineffective assistance of counsel and his conviction violates the Sixth Amendment to the United States Constitution and Article I, § 12 of the Utah Constitution.

ARGUMENT

MR. ALVILLAR'S CONVICTION WAS OBTAINED THROUGH THE INEFFECTIVE ASSISTANCE OF COUNSEL AND MUST BE VACATED.

The right to counsel is fundamental to a fair trial. *E.g.*, Kimmelman v. Morrison, 477 U.S. 365 (1986); Gideon v. Wainwright, 372 U.S. 335 (1963). The right to counsel under the Sixth Amendment is essential because it is through counsel that other constitutional guarantees are secured. United States v. Cronin, 466 U.S. 648 (1984). The accused's lawyer must function as an active advocate, rather than as a mere friend of the court. Evitts v. Lucey, 469 U.S. 387, 394 (1985); Osborn v. Shillinger, 861 F.2d 612 (10th Cir. 1988). The Utah and United States constitutions therefore require defense counsel to play "the role necessary to ensure that the trial is fair," Strickland v. Washington, 466 U.S. 668, 685 (1984), by guaranteeing that "the right to counsel is the right to *effective* assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.4 (1970) (emphasis added). *Accord*, *e.g.*, State v. Templin, 805 P.2d 182 (Utah 1990).

Under the standard established in Strickland for evaluating an ineffective assistance claim, reversal is required if a defendant demonstrates that counsel's performance was deficient and that the deficiency prejudiced the defense. The "deficient performance" prong of the Strickland test is satisfied by proof that counsel's representation "fell below an objective standard of reasonableness,"

based on prevailing professional norms. 466 U.S. at 688; Templin, 805 P.2d at 186. The "prejudice" prong of the test is met by demonstrating a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." 466 U.S. at 694. A reasonable probability is one which is "sufficient to undermine confidence in the outcome," but "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case."² 466 U.S. at 694, 693; Templin, 805 P.2d at 187; State v. Verde, 770 P.2d 116, 119 n. 2 (Utah 1989).

In applying the Strickland test, the reasonableness of a defense attorney's conduct must be evaluated from her perspective at the time of representation, and in light of all the circumstances of the case. 466 U.S. at 689-90. The burden is on the defendant to overcome a presumption that counsel's representation fell within a wide range of reasonable assistance and that the proceeding's result was reliable. Further, the right to effective assistance focuses on the adversarial process rather than on the rapport between attorney and client. Therefore, no weight should be given to "either [a defendant's] expression of satisfaction with counsel's performance at the time of his trial, or to his later expression of dissatisfaction." Cronic, 466 U.S. at 657 n.21.

Mr. Alvillar contends that he received ineffective assistance of counsel

² The Strickland test therefore establishes a standard of proof which is lower than the "preponderance of the evidence" standard used in civil cases.

in his direct examination. In front of the jury, defense counsel elicited that information that Mr. Alvillar had been convicted of a felony 13 years earlier, that he was on parole for that crime and that he had absconded from a halfway house in June 1994. (Transcript of Trial, P. 177). This information was extremely **prejudicial** and inadmissible under Rule 609 of the Utah Rules of Evidence.

Rule 609 provides that a defendant's testimony can be impeached with evidence that he has been convicted of a crime which "involved dishonesty or false statement," or a felony **not** involving dishonesty or false statement only if "the court **determines** that the probative value of admitting this evidence outweighs its prejudicial effect." State v. Banner, 717 P.2d 1325 (Utah 1986); State v. Gentry, 747 P.2d 1032 (Utah 1987). In the absence of a showing of specific facts indicative of fraudulent action, the crimes of theft and burglary ordinarily do not involve **dishonesty** or false **statement**. State v. Bruce, 779 P.2d 646 (Utah 1989); State v. Lanier, 778 P.2d 9 (Utah 1989); State v. Brown, 771 P.2d 1093 (Utah App. 1989); State v. Wight, 765 P.2d 12 (Utah App. 1988).

The Rule 609 restrictions applied in Banner and succeeding cases are intended to insure a defendant's prior felony convictions are admissible "only to test veracity and credibility" and not to prejudice the jury against the him. "Care must be taken to **insure** the defendant is not convicted for past rather

than present crimes." State v. Tucker, 800 P.2d 819, 823 (Utah App. 1990). As Chief Justice Zimmerman has recognized, "evidence of prior convictions and other bad acts has tremendous potential to say the finder of fact unfairly" and increases the likelihood that the defendant will be convicted. State v. Gardner, 789 P.2d 273, 289 (Utah 1989) (Zimmerman, J., concurring). Cf. State v. Florez, 777 P.2d 452, 458 (Utah 1989) (Defendant's murder conviction vacated because aggravating circumstance based on prior convictions were introduced at the guilt phase of trial without using a bifurcated procedure); State v. James, 767 P.2d 549 (Utah 1989) (Aggravating circumstances based on prior convictions should be handled in a bifurcated procedure by withholding evidence of prior convictions until after jury has found an intentional and knowing killing).

The prior conviction elicited here by defense counsel was not admissible under Rule 609. In fact, prior to trial, the district court granted Mr. Alvillar's motion in limine under Rule 609 to preclude the prosecution from questioning him to establish that the prior offense was a burglary and that he had used a different name when arrested. (Transcript of Motions Hearing, 1/30/95). Further, it would have been error for the prosecution to introduce the testimony defense counsel brought out -- that Mr. Alvillar had been previously convicted of a felony, that he was on parole and that he had escaped from a

halfway house a short time before the Coles' home was burglarized. Cf. State v. Saunders, 699 P.2d 738 (Utah 1985) (Abuse of discretion to **deny motion** to sever charge of unlawful possession of a firearm while housed in a halfway house from charges of burglary and theft).

Here, there was no **legitimate** reason to introduce the prejudicial information elicited from Mr. Alvillar. His failure to admit any knowledge of the compact disc collection and his statements implicating Mr. Nyman could be explained as the product of a fear of going to prison, without informing the jurors that he had been convicted of a felony. Further, if there was any reason to disclose the felony conviction to explain Mr. Alvillar's actions, **discussing his** status as a parolee and an escapee was not warranted at all. Eliciting testimony about Mr. Alvillar's prior conviction, his parole status and his escape from the halfway house cannot be explained as a reasonable trial strategy, and doing so constitutes deficient performance under Strickland. Cf. State v. Grueber, 776 P.2d 70, 76 (Utah App. 1989) (Reasonable strategic decision implied because defense counsel successfully disputed the admissibility of more prejudicial prior conviction but did not challenge less prejudicial convictions).

Prejudice is established under Strickland because there is a **reasonable probability** that the jury's **verdict would have been** different here in the absence of the highly inflammatory evidence introduced by defense counsel. There

were conflicting stories before the jury. Mr. Alvillar's testimony that he had unwittingly received the Coles' property from a friend was believable and there is a reasonable likelihood that it would have been accepted by jurors who did not know he was a convicted felon and that he was on parole and had escaped from a halfway house.

CONCLUSION

For the foregoing reasons and authorities, Mr. Alvillar respectfully requests this Court to vacate his convictions of Burglary and Theft and remand this case for a trial with the assistance of effective counsel.

JAMES C. BRADSHAW
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I certify that a copy of this **Brief of Appellant** was placed in the United States Mail, postage prepaid and addressed to Joanne Slotnik, Assistant Attorney General, 236 State Capitol, Salt Lake City, Utah 84114, on this _____ day of October, 1995.

ADDENDUM

1 IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
2 THE STATE OF UTAH, COUNTY OF SALT LAKE

3
4 CERTIFIED COPY

5
6 THE STATE OF UTAH)
Plaintiff,)

7 vs.)

8 GUIDO JOHN ALVILLAR)
Defendant.)

Case No. 941901331

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11 TRANSCRIPT OF PROCEEDINGS

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15 Proceedings before the Honorable
16 MICHAEL R. MURPHY
17 on January 31 and February 1, 1995

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23 CATHY GALLEGOS
24 CERTIFIED COURT REPORTER
25 2901 W. Bedford Road
West Valley City, Utah 84119

1 Q I want to talk to you a little bit about when
2 the police officers were questioning you, you heard them
3 state several times that you used another name, name of
4 Steve Falconi?

5 A Yes.

6 Q Explain to the jury were why you used the
7 name Steve Falconi?

8 A I was arrested about thirteen years ago. I
9 will be honest, I got convicted of a felony about thirteen
10 years ago. I was on parole at the time and what happened
11 was I was actually in a halfway house, and I had absconded
12 from the halfway house, and that's why I gave them the
13 facilities name and--

14 Q Can you explain to the jury what "absconded"
15 means?

16 A Excuse me?

17 Q What "absconded" means.

18 A It means I ran from the halfway house.

19 Q When did that happen?

20 A It was about the first part of or the end of
21 June, the end of June.

22 Q Is that when you met Mr. Nyman?

23 A Approximately. It was about a week later.

24 Q You also gave him the name "Steve Falconi."
25 Can you tell the jury why you told him that your name was

1 Steve Falconi?

2 A Like I said, you know, I took off from the
3 halfway house. I was real scared. I didn't want anybody
4 to know my real name. My real name is Guido John
5 Alvillar. I didn't want to go back to prison is the
6 reason I didn't told everybody a different name.

7 Q Now, when the police officers interviewed you
8 at the Discriminator Records, you heard you told them you
9 didn't know anything about the CD's. Would you explain to
10 the jury why you said that?

11 A Well, really, when they were talking, they
12 were talking about arresting me, taking me to jail. I
13 figured I had ran from the halfway house. I was wanted by
14 adult probation and parole, and I just, I was real scared,
15 you know, and you know, I admit I did tell them a false
16 statement. I am coming forth now. I admit I did have the
17 property. It was my property. It was given to me.

18 Q Did you know the property was stolen?

19 A I didn't.

20 Q Did you have any reason to know it was
21 stolen?

22 A No, I didn't.

23 Q I have nothing further, Your Honor.

24 CROSS-EXAMINATION

25 BY MR. PARKER:

1 Q When?

2 A When I was living with him, I had told him I
3 was going to be getting property from a friend of mine.

4 Q I am talking about after you were picked up
5 and after you had blamed Mr. Nyman for having the property
6 and bringing it there, you didn't ever call and apologize
7 to Mr. Nyman for involving him?

8 A I was told not to contact any of the
9 witnesses.

10 Q Let's make this clear, you have never seen
11 this bag before, according to your statement?

12 A Not-- I didn't recognize the brand name. The
13 bag looks similar to my Kirkham bag, the Kirkham bag I
14 had.

15 Q According to your story, it was your Kirkham
16 bag you went over, picked up the tapes in.

17 A Yes.

18 Q It was not this bag?

19 A No.

20 Q No further questions.

21 REDIRECT EXAMINATION

22 BY MS. CLARK:

23 Q Will you tell the jury why you couldn't
24 continue to tell the same story Mr. Nyman was involved in
25 this?

1 A Well, I was just really scared, you know, I
2 found out that the property was stolen, and I know it was
3 really wrong for me to blame it on someone else. That's
4 why I came forward today with the argument that I did have
5 the property. You know, like I said, I do feel bad about
6 blaming it on Mr. Nyman in the beginning, but I was just
7 real scared. I don't want to go back to prison and that's
8 mainly the reason why.

9 Q Did you have any reason for not telling them
10 about your friend?

11 A Well, I kind of wouldn't want to implicate
12 anybody else. I have tried to contact him since noon,
13 he's moved to California. I have been unable to locate
14 him to basically back up what I am saying, that he did
15 give me the property.

16 Q Now, did you at any time on August 2nd go in
17 the area of 1300 East Third Avenue?

18 A I did not.

19 Q Did you at any time attempt to or break into
20 Mr. and Mrs. Cole's' house?

21 A No, I didn't.

22 Q Do you know anyone that did do that?

23 A Not that I am aware of, no.

24 Q And at the time prior to approaching the
25 Discriminator, did you know the property belonged to Mr.


CERTIFICATE OF COURT REPORTER

THE STATE OF UTAH)

COUNTY OF SALT LAKE)

I, Cathy Gallegos, Registered Professional Reporter in the State of Utah, do hereby certify that the above and foregoing printed pages contain a full, true and correct transcription of my shorthand notes taken upon the occasion set forth in the caption hereof, transcribed by me or under my supervision, by means of computer transcription.

Witness my hand, this 29th day of August, 1995.



Cathy Gallegos, RPR